



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
428 J Street • Suite 620 • Sacramento, CA 95814-2329  
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June 2, 2015

Aaron C. Harp  
City Attorney  
100 Civic Center Drive  
Newport Beach, California 92660

Re: Your Request for Advice  
**Our File No. A-15-094**

Dear Mr. Harp:

This letter responds to your request for advice on behalf of Newport Beach Council Member Marshall “Duffy” Duffield regarding the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> This letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

You also mentioned Section 1097.1 in your letter, but raised no Section 1090 questions. Therefore, we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

### QUESTION

May Council Member Duffield participate in governmental decisions involving on-shore and off-shore moorings in Newport Harbor including (a) modifying current mooring regulations; (b) altering mooring transfer rules; (c) setting mooring rental fees; and (d) other similar mooring issues, despite having various financial interests in proximity to the mooring sites?

### CONCLUSION

Based on the facts presented, it is not reasonably foreseeable that the Councilmember’s interests will be foreseeably and materially financially affected by the decisions in question.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## FACTS

***Councilmember Duffield:*** Councilmember Duffield was elected to the Newport Beach City Council at the November 4, 2014 General Election. For the past 45 years, Councilmember Duffield has been building boats in California and is the owner and Chief Executive Officer (“CEO”) of Duffield Marine Incorporated, d.b.a. Duffy Electric Boat Company (“Duffy Boats”). Duffy Boats is the leader in the leisure electric boat market, having built over 13,000 electric boats. Over 3,500 electric boats constructed and sold by Duffy Boats are in service in Newport Harbor.

Duffy Boats leases two properties in the City under long term leases and Councilmember Duffield owns a personal residence within the City: (1) a boat rental and sales facility located at 2001 West Coast Highway, Newport Beach; (2) a boat service facility located at 2439 West Coast Highway, Suite 103, Newport Beach; and (3) Councilmember Duffield’s personal residence is located approximately 560 feet from Newport Harbor. Both leased properties are located adjacent to Newport Harbor. Duffy Boats also has an annual commercial pier permit from the City for the boat rental and sales facility located at 2001 West Coast Highway, which allows Duffy Boats to maintain a marina over publicly owned tidelands in Newport Harbor. Duffy Boats’ marina is used exclusively by the company and is not subleased to third parties.

Duffy Boats’ primary business focuses on sales, rentals, and service of electric boats. Duffy Boats also provides a monthly maintenance plan to electric boat owners called Duffy Care. For purposes of this request, the Commission should assume that Duffy Boats may receive over \$500 from a client for an individual sale, rental, service, or annual Duffy Care plan.

Councilmember Duffield’s job duties at Duffy Boats are varied. He plays an active role in creating new products for his company and driving the overall direction of the company. As the owner and CEO, Councilmember Duffield has the ability to control, direct and manage all aspects of Duffy Boats’ operations.

As the sole owner, Councilmember Duffield owns 100% of Duffy Boats’ privately-held shares. For purposes of this request, the Commission should assume that these shares exceed \$2,000 in value.

***Moorings in Newport Harbor:*** The City, via the Beacon Bay Bill, has oversight and management of tidelands which includes, but is not limited to, land located beneath Newport Harbor. One of the uses of tidelands authorized by the City, via the Newport Beach Municipal Code, is the use of moorings. A mooring is a device consisting of a floating buoy or other object that is secured to the harbor bottom by an anchor system for purposes of securing a vessel.

Currently, there are approximately 800 off-shore public moorings and 439 on-shore public moorings situated on tidelands in Newport Harbor. None of the public moorings are within 500 feet of Council Member Duffield’s properties and Council Member Duffield does not have a public or private mooring.

Prior to 2011, City mooring permits were bought and sold via the private market. Specifically, the permit holders were allowed to make unlimited transfers of their mooring permit and there was only a minimal transfer fee. The rules related to mooring permits were changed in

2011 to: (1) provide for only two transfers of the mooring permit prior to 2021; and (2) not allow any transfers (except to immediate family) after 2021.

Also, beginning in 2011, the City adjusted the rent charged for moorings by increasing the rate charged for: (1) off-shore moorings from \$20 per foot, per year, in 2010 to approximately \$55.43 per foot, per year, in 2015; and (2) on-shore moorings from \$10 per foot, per year, in 2010 to approximately \$27.71 per foot, per year, in 2015.

***Moorings and Duffy Boats:*** Currently, no Duffy Boat is officially using on-shore or off-shore moorings. On occasion, an owner of a Duffy Boat may use an off-shore mooring; however, the Duffy Boat is not officially registered as the permit holder's boat assigned to the mooring. On those rare occasions when an owner of a Duffy Boat uses an off-shore mooring, the owner of the Duffy Boat usually uses the mooring for less than a week. You stated that a Duffy Boat is not designed to be used at moorings given that they are electric boats. A Duffy Boat owner once used a shore mooring in the Grand Canal between the big and small Balboa Islands. This person is no longer using the mooring for that purpose. While using a mooring for a Duffy Boat is theoretically possible, given the difficulties associated with charging Duffy Boats located on moorings, this use is impractical. Also, a Duffy Boat draws two feet of water to float which means that a shore mooring is not practical because it is impossible to bring the boat close enough to shore to board it without getting wet.

The primary use of a Duffy Boat is to cruise Newport Harbor. While a Duffy Boat could be used to access an off-shore mooring, this would be an ancillary use of the boat.

***Moorings and Duffy Boat Owners:*** At this time, it is unknown whether any owner of a Duffy Boat or a recipient of "Duffy Care" has a mooring permit from the City.

***Proposed City Council Action:*** At the June 9, 2015 City Council meeting, the City Council will be asked to review and potentially modify the rules and regulations related to moorings. This will include a discussion and possible action related to: (1) current mooring regulations; (2) mooring transfer rules; (3) mooring rental fees; and (4) other mooring issues.

## ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. (Section 87100.) Interests from which a conflict of interest may arise are defined in Section 87103 and include the following:

*(a) Any business entity in which the public official has a direct or indirect investment worth \$2,000 or more.*

The Councilmember is the owner of Duffy Boats.

*(b) Any real property in which the public official has a direct or indirect interest worth \$2,000 or more.*

The Councilmember, through Duffy Boats,<sup>2</sup> leases two properties in the City under long term leases: (1) a boat rental and sales facility located at 2001 West Coast Highway, Newport Beach; and (2) a boat service facility located at 2439 West Coast Highway, Suite 103, Newport Beach. Councilmember Duffield owns a personal residence located approximately 560 feet from Newport Harbor.

*(c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating \$500 or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.*

The Councilmember has an interest in numerous persons as sources of income, including his business Duffy Boats, and the clients of Duffy Boat.

*(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.*

The Councilmember is the CEO of Duffy Boats.

*(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two \$460 or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.*

You have not requested advice about sources of gifts and we do not analyze this potential basis for conflict of interest.

*Foreseeability:* A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material. The standard for foreseeability differs depending on whether an interest is explicitly involved in the decision. A financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the interest, and includes any governmental decision affecting a real property interest of the official. (Regulation 18701(a).) Under your facts, none of the Councilmember's interests are explicitly involved in the decisions. Thus, the applicable foreseeability test is in Regulation 18701(b) and provides: "[I]f the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable."

*Materiality; Real Property:* According to your facts, the mooring sites currently exist. The City Council will be asked to review and potentially modify the rules and regulations related to the

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<sup>2</sup> Pursuant to Section 87103, an official has an "indirect interest" in real property owned by a business entity or trust in which the official, the official's immediate family, or their agents own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.)

existing moorings, such as (1) current mooring regulations; (2) mooring transfer rules; (3) mooring rental fees; and (4) other mooring issues.

The Councilmember's residence is located 560 feet from the Bay, and the moorings are an additional 500 feet or more from the shoreline of the Bay. Regulation 18702.2(a) provides several standards of materiality applicable to the Councilmember's residence when the decision explicitly affects the residence or affects property near the residence. None of these standards apply to the Councilmember's residence.

Regulation 18702.2(b) provides that with respect to the leased property (the properties at 2001 West Coast Highway and at 2439 West Coast Highway) that the reasonably foreseeable financial effects of a governmental decision on such real property is material if the governmental decision will: (1) change the termination date of the lease; (2) increase or decrease the potential rental value of the property; (3) increase or decrease the rental value of the property (and the official has a right to sublease the property); (4) change the official's actual or legally allowable use of the real property; or (5) impact the official's use and enjoyment of the real property. Again, according to your facts, none of these apply to the leased property. Consequently, the property interests of the Councilmember will not be the basis for a conflict of interest.

*Materiality; Duffy Boats and Business Clients*<sup>3</sup>: Regulation 18702.1(b) provides:

“[T]he financial effect is material if a prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change in the price of the business entity's publicly traded stock, or the value of a privately-held business entity.”<sup>4</sup>

You stated that:

- No Duffy Boat is officially using on-shore or off-shore moorings. On occasion, an owner of a Duffy Boat may use an off-shore mooring; however, the Duffy Boat is not officially registered as the permit holder's boat assigned to the mooring. On those rare occasions when an owner of a Duffy Boat uses an off-shore mooring, the owner of the Duffy Boat usually uses the mooring for less than a week.

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<sup>3</sup> Regulation 18702.3(a) provides: “For income received by the official or his or her spouse for goods and services provided in the ordinary course of business, including a salary, the financial effect is material if . . . the source is a business entity that will be financially affected under the standards as applied . . . in Regulation 18702.1.”

<sup>4</sup> Examples of decisions that may be applicable include those that: (1) authorize, prohibit, regulate or otherwise establish conditions for an activity in which the business entity is engaged; (2) increase or decrease the amount of competition in the field in which the business entity is engaged; (3) increase or decrease the need for the products or services that the business entity supplies; (4) make improvements in the surrounding neighborhood such as redevelopment projects, traffic/road improvements, or parking changes that may affect, either temporarily or permanently, the amount of business the business entity receives; (5) decide the location of a major development, entertainment facility, or other project that would increase or decrease the amount of business the entity draws from the location of the project; or (6) increase or decrease the tax burden, debt, or financial or legal liability of the business entity. None of these standards apply to the decisions in question.

- The primary use of a Duffy Boat is to cruise Newport Harbor. While a Duffy Boat could be used to access an off-shore mooring, this would be an ancillary use of the boat. Duffy Boats are not designed to be used at moorings given that they are electric boats. While using a mooring for a Duffy Boat is theoretically possible, given the difficulties associated with charging Duffy Boats located on moorings, this use is impractical.
- Also, a Duffy Boat draws two feet of water to float which means that an on-shore mooring is not practical because it is impossible to bring the boat close enough to shore to board it without getting wet.
- At this time, it is unknown whether any recipient of “Duffy Care” has a mooring permit from the City.

Based on these facts, it does not appear reasonably foreseeable that the decisions’ financial effect (if any) on Duffy Boats would contribute to a change in the value of the business.

Moreover, the facts suggest that while possible, any financial effect on sources of income to Duffy Boats is merely hypothetical or theoretical at this time, and consequently, not reasonably foreseeable.

Thus, based on the facts presented, it is not reasonably foreseeable that the Councilmember’s interests will be foreseeably and materially financially affected by the decisions in question.<sup>5</sup>

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

/s/

John W. Wallace  
Assistant General Counsel  
Legal Division

JWW:jgl

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<sup>5</sup> We note that you also ask about future unspecified decisions relating to the moorings. As new decisions arise or the specified decisions change, this analysis will need to be revised. You should contact us for further advice under those circumstances.